Supreme Court, U.S.
FILED

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No. ____

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005

RANDALL INDUSTRIES, INC. AND
RANDALL RENTS OF INDIANA,

Petitioners,

v.

CHRISTOPHER PEASE, VINCE VITI,
WILLARD BERGE and MIKE GEAR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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January 2005

QUESTIONS PRESENTED

1. Whether it is a violation of due process to deprive a party of its right to recover attorneys' fees for defending against a frivolous appeal as provided by Federal Rule of Appellate Procedure 38 by applying a "timeliness" requirement without prior notice.

2. Whether it is appropriate for this Court to resolve a split in the Circuits and announce a uniform guideline as to the timing of a motion pursuant to Rule 38 given the Rule's silence as to when a motion must be filed.

STATEMENT REQUIRED BY RULE 29.1

Randall Industries, Inc. is a corporation that has no parent company and there is no publicly held corporation that owns ten (10) percent or more of its stock. Randall Rents of Indiana, is also a corporation that has no parent company and there is no publicly held corporation that owns ten (10) percent or more of its stock.

PARTIES BELOW

The parties in the proceeding before the United States Court of Appeals for the Seventh Circuit were Randall Industries, Inc., Randall Rents of Indiana and Production Workers Union of Chicago and Vicinity Local 707,

Appellees; and Christopher Pease, Willard Berge, Mike Gear and Vince Viti, Appellants.[1]

[1] As the Seventh Circuit indicated, the International Union of Operating Engineers, Local 150 AFL-CIO is in effect a party to this action as it funded both the appeal as well as the underlying litigation. *See Pease v. Production Workers Union of Chicago and Vicinity Local 707*, 386 F.3d 819, 822 (7th Cir. 2004). Local 150 is and has been waging a corporate campaign against Randall and has previously been held in contempt of an order to refrain from violating labor laws in its treatment of Randall employees. *See id.* at 821.

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OPINIONS BELOW

This petition seeks review of the Decision and Order of Judge Easterbrook of the United States Court of Appeals for the Seventh Circuit, on Petitioners' Motion for Sanctions pursuant to FED. R. APP. P. 38 in *Pease v. Production Workers Union of Chicago and Vicinity Local 707*, 386 F.3d 819 (7th Cir. 2004), reproduced in the Appendix accompanying this petition at page A-1. Petitioners also seek review of the denial of their Motion to Reconsider or Alternatively Petition for Rehearing, which was denied on November 16, 2004 and is reproduced in the Appendix accompanying this petition at page B-1. The decision of the United States Court of Appeals for the Seventh Circuit on appeal, which formed the basis of Petitioners' Rule 38 Motion, is set forth at pages C-1 to C-8 of the Appendix.[2]

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[2] In order to provide this Court with further background information, Petitioners have provided the decisions of the United States District Court for the Northern District of Illinois which granted Petitioners' Motion for Judgment as a Matter of Law (attached at Appendix F-1 – F-24) and Petitioners' Motion for Summary Judgment, in part (attached at Appendix G-1 – G-32).

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit as to Petitioners' Motion for Sanctions pursuant to FED. R. APP. P. 38 was issued on November 2, 2004. This petition is timely under 28 U.S.C. § 2101(c). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l). Jurisdiction of the lower courts was invoked under 29 U.S.C. § 185 and § 1331.

STATUTORY PROVISIONS

Federal Rule of Appellate Procedure 38 provides:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

FED. R. APP. 38 (Amended April 29, 1994) is reproduced in the Appendix at page D-1.

The Fifth Amendment of the United States Constitution provides:

> No person shall be … deprived of life, liberty, or property, without due process of law; nor

> shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

STATEMENT OF THE CASE

On October 15, 2004, the Seventh Circuit entered its order affirming judgment in favor of Petitioners Randall Industries, Inc. and Randall Rents of Indiana (collectively referred to as "Petitioners" or "Randall"). In that decision, the Seventh Circuit stated, "That Local 150 continues to argue on [Viti's] behalf (and that of Pease) implies that this is *vexatious litigation*." *Pease v. Production Workers Union of Chicago and Vicinity Local 707*, 386 F.3d 819, 822 (7th Cir. 2004) (emphasis added). (App. C-3 – C-5) As to the appeal on behalf of Appellant Berge, the Seventh Circuit indicated that his claim should never have reached a jury in the first place. *Id.* at 823-24. Appellant Gear made no argument on appeal, and thus, his appeal was deemed waived. *Id.* at 821.

On October 29, 2004 (fourteen days later), Randall simultaneously filed a Bill of Costs (which was awarded to Randall) and a separate Motion for Sanctions pursuant to FED.

R. APP. P. 38. Randall's Rule 38 Motion requested two types of sanctions, the first in the form of double costs and the second in the form of attorneys' fees. On November 2, 2004, the Seventh Circuit declared Randall's Rule 38 Motion for Sanctions untimely. (App. A-1). On November 12, 2004, Randall filed a Motion to Reconsider or alternatively a Petition for Rehearing. Although the Seventh Circuit acknowledged it had not adopted a formal deadline for filing a Rule 38 Motion, it nonetheless denied Randall's Motion to Reconsider because it held the original motion was untimely. (App. B-1).

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DENIAL OF RANDALL'S RULE 38 MOTION AS UNTIMELY WITHOUT ANY PRIOR GUIDANCE AS TO THE DEADLINE FOR FILING SUCH A MOTION WAS CONTRARY TO THE PLAIN LANGUAGE OF RULE 38 AND DEPRIVED PETITIONERS OF THEIR RIGHT TO RECOVER DAMAGES WITHOUT DUE PROCESS.[3]

A. Plain Language Violated

Federal Rule of Appellate Procedure 38 does not provide a time limit for filing a motion to impose sanctions for filing a frivolous appeal. Rule 38 merely states:

> *If a court* of appeals *determines* that an appeal is frivolous, it may, *after* a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

FED. R. APP. 38 (Amended April 29, 1994) (emphasis added).

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[3] It is impossible to determine the frequency with which motions under Rule 38 are denied as the orders denying them are unpublished – which raises another constitutional question. *See Anastasoff v. United States*, 222 F.3d 898 (8th Cir. 2000), *vacated as moot en banc* 235 F.3d 1054 (8th Cir. 2000).

Prior to the 1994 amendments to Rule 38, the Seventh Circuit had on occasion *sua sponte* imposed attorneys' fees as a sanction for filing a frivolous appeal. *See e.g. Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1200-03 (7th Cir. 1987). Since the 1994 Amendment, the Seventh Circuit has not provided any guidance, either by Circuit Rule or published decision, as to when a motion for sanctions must be filed. In fact, the lack of such a formal deadline was conceded by the Seventh Circuit in its decision as to Randall's Motion to Reconsider, which acknowledged that there is no formal deadline for filing a motion for sanctions in the Seventh Circuit. (App. B-1) ("Our reference to timeliness in the November 2, 2004 order was not a suggestion that there is a formal deadline for filing a motion for sanctions ....").

Randall's Motion to Reconsider was denied with the explanation that "sanctions should have been requested in advance of decision." (App. B-1) This requirement is contrary to the plain language of Rule 38. Rule 38 imposes,

as a prerequisite to the filing of a motion under Rule 38, that the appellate court find the appeal was frivolous. This is apparent from the "If ... then" construction of the first sentence of Rule 38. As that sentence states, "If a court of appeals determines that an appeal is frivolous it may, after a separately filed motion or notice from the court ... award just damages." FED. R. APP. P. 38. This language denotes a two-step process for awarding fees pursuant to Rule 38. First, the Court must determine that an appeal is frivolous. Then, there must be either a separately filed motion or notice from the court that it is considering the issue of damages. After an opportunity to respond, the court may then award just damages.[4]

Randall acted pursuant to this two-step process. After the Seventh Circuit declared that the strength of Appellants' arguments implied that this was "vexatious litigation",

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[4] As discussed in Part II *infra*, this two-step approach has been adopted by a majority of the circuits which have considered the issue.

Randall filed its Motion, which in part sought double costs, within the 14-day time limit for filing a bill of costs under Rule 39.[5] This motion was peremptorily declared untimely and denied. (*See* App. A-1).

B. Due Process Violated

Although the Seventh Circuit may establish a timeline for filing a Rule 38 Motion, as some circuits have, in the absence of any prior guidance by the Seventh Circuit, it is a violation of Randall's Fifth Amendment right to due process to deprive it of its statutorily created right to recover damages for defending against a frivolous appeal. *See Brokaw v. Mercer County*, 235 F.3d 1000, 1020 (7th Cir., 2000) (depriving an individual of a property interest without notice and an opportunity to be heard violates procedural due process). Indeed, this Court has held that the mandates of due process require a court to provide notice and an opportunity to respond prior to assessing sanctions against a

[5] It is worth noting that this is the same time limit for filing a petition for rehearing pursuant to Rule 40.

party. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50, 111 S.Ct. 2123, 2136, 115 L.Ed.2d 27 (1991); *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 765, 100 S.Ct 2455, 2464, 65 L.Ed.2d 488 (1980); *see also McDonough v. Royal Caribbean Cruises*, 48 F.3d 256, 258 (7th Cir. 1995). In relation to imposing sanctions, depriving a party of the right to seek sanctions is merely the flip side of the same coin. Reason dictates that if a party bringing a frivolous appeal may not be required to pay sanctions under Rule 38 without notice, a party forced to defend a frivolous appeal should not be deprived of its right to recover sanctions without notice of when or how this right expires.[6] Accordingly, the mandates of due process under the Fifth Amendment likewise require some form of notice as to the deadline for filing a Rule 38 Motion before such a motion is declared untimely.

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[6] And indeed Randall's experience offers no guidance to future litigants as the Seventh Circuit's decision is hidden from view by virtue of the fact it is unpublished.

II. THERE IS A SPLIT AMONG THE CIRCUIT COURTS AS TO WHETHER A RULE 38 MOTION MUST BE FILED BEFORE OR AFTER A DECISION ON APPEAL

Rule 38's silence as to when a motion must be filed has led to a split in the circuits as to deadlines for such motions. The time limits for filing a Rule 38 motion for sanctions fall into two categories, the "if ... then" courts and the "file before decision" courts. The "if ... then" courts constitute the clear majority. They have adopted the following time periods for a party to seek sanctions *after* the decision on appeal:

a) First Circuit – Within 30 days *after* the date of entry of the final circuit judgment. *See* First Circuit Rule 39;

b) Fifth Circuit – A request for sanctions under Rule 38 must be filed as a "petition for rehearing" within 14 days *after* the decision. *Knoblauch v. Commissioner of Internal Revenue*, 752 F.2d 125, 127 (5th Cir. 1985) (directing the Appellee to file a Rule 38 motion for

sanctions in the form of attorneys fees by petition for rehearing within 14 days of the entry of that decision); *Sims v. Great-West Life Assurance Co.*, 941 F.2d 368, 371 (5th Cir. 1991) ("Requests for single or double costs must be made within 14 days following entry of judgment to be timely filed.");

c) Ninth Circuit – Within 14 days of the period within which a petition for rehearing or suggestion for rehearing *en banc* may be filed – which may be filed within 14 days *after* the decision. *See* Ninth Circuit Rule 39-1.6;

d) D.C. Circuit – "[U]nder [Rule 38's] terms and in the absence of any rule of this Court to the contrary, there is no time limit for motions under Rule 38 other than the principles of laches." *Singer v. Shannon & Luchs Co.*, 868 F.2d 1306, 1307-1308 (D.C. Cir. 1989). In that case, the D.C. Circuit held:

> The allowance of an application under Rule 38 long after the time will have expired for a bill of costs under Rule 39 [fourteen days] is justified by

> the special purpose of the former rule. It seeks to deter and punish frivolous appeals. The social interest in so doing, and the standard of egregiously objectionable conduct that triggers its application, justify imposing fewer technical restrictions.

Id. at 1308.

In sum, the majority of circuits to consider the issue, namely the First, Fifth, Ninth, and D.C. Circuits, have all declared that sanctions under Rule 38 may be sought within a reasonable time after the final decision on appeal.

A minority of the courts to consider the issue have instead adopted the "file before decision" model. The Eleventh Circuit has issued a rule that a motion must be filed prior to the decision in order to be timely. *See* Eleventh Circuit Rule 38-1 ("Motions for damages and costs pursuant to FRAP 38 must be filed no later than the filing of appellee's brief."). The Seventh Circuit's ruling in this case squarely places it in the minority view -- that a motion for sanctions

under Rule 38 must be filed prior to the court's a final decision.[7]

As indicated *supra*, Rule 38 is silent as to when a motion must be filed. In the absence of guidance in the Federal Rules of Appellate Procedure, the Courts of Appeal for the First, Fifth, Ninth, Eleventh and D.C. Circuits have established time limits for filing a Rule 38 Motion. These five Circuit Courts have reached a different result regarding whether Rule 38 sanctions must be sought before or after a decision. *See Sims*, 941 F.2d at 371 (5th Cir. 1991); *Singer*, 868 F.2d at 1307-1308 (D.C. Cir. 1989); *Knoblauch*, 752 F.2d at 127 (5th Cir. 1985); *see also* First Circuit Rule 39; Ninth Circuit Rule 39-1.6; Eleventh Circuit Rule 38-1. A determination by the Court is therefore necessary to secure and maintain uniformity under the Federal Rules of Appellate Procedure.

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[7] Notably, unlike every other circuit to have considered the issue including the Eleventh Circuit, the Seventh Circuit, however, does not and did not provide advance notice of the timing requirements for seeking sanctions under Rule 38.

CONCLUSION

Rule 38 was designed with the dual purpose of discouraging frivolous appeals and compensating parties who are the victims of such appeals. The forfeiture of a statutory right is of exceptional importance and due process mandates that the right to recover the costs of defending against a frivolous appeal under Rule 38 should not be forfeited without notice of the deadline for seeking relief. Moreover, there is a split among the appellate courts as to whether a Rule 38 motion should be filed before or after a decision. Although Rule 38 is silent as to the deadline for filing a motion, it does indicate a two-step process requiring a separate filing after a final decision on appeal. This two-step process has been adopted by the majority of circuits to consider the issue. The Court should grant this petition so as to resolve the further split caused by the Seventh Circuit's decision to adopt the minority view.

For the foregoing reasons, this Court should grant Randall's Petition for Certiorari, summarily vacate the

Seventh Circuit's Decision and Order declaring Randall's Rule 38 Motion untimely and declare a uniform time limit for filing Rule 38 motions after a decision on appeal.

Respectfully submitted,

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January 28, 2005

APPENDIX

APPENDIX

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Order issued by United States Court of Appeals For the Seventh Circuit denying Appellees' motion for sanctions..... A-1

Order issued by United States Court of Appeals For the Seventh Circuit denying Appellees' motion to reconsider or alternatively petition for rehearing B-1

Decision of the United States Court of Appeals For the Seventh Circuit affirming the underlying decisions of the United States District Court for the Northern District of Illinois.....C-1 – C-8

Federal Rule of Appellate Procedure 38..... D-1

United States Constitution, Amendment V.....E-1

Decision of the United States District Court for the Northern District of Illinois granting Petitioners' Motion for Judgment as a Matter of Law ..... F-1 – F-24

Decision of the United States District Court for the Northern District of Illinois as to Summary Judgment ..... G-1 – G-32

United States Court of Appeals
For The Seventh Circuit
November 2, 2004

Before
Hon. FRANK H. EASTERBROOK, *Circuit Judge*

CHRISTOPHER PEASE, VINCE VITI, WILLARD BERGE, et al., Plaintiffs-Appellants,	]	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 04-1928 v.	]	No. 02 C 6756
PRODUCTION WORKERS UNION OF CHICAGO AND VICINITY, LOCAL 707; RANDALL INDUSTRIES, INCORPORATED, and RANDALL RENTS OF INDIANA, Defendants-Appellees.	]	James F. Holderman, Judge.

The following are before the court:

1. APPELLEE RANDALL'S MOTION FOR SANCTIONS, filed on October 29, 2004, by counsel for Randall Industries and Randall Rents of Indiana.

2. LOCAL 707'S JOINDER OF CODEFENDANT-APPELLEE, RANDALL'S RULE 38 MOTION FOR SANCTIONS AND COSTS, filed on October 29, 2004, by counsel for the appellees.

IT IS ORDERED that #1 and #2 are DENIED as untimely.

United States Court of Appeals
For The Seventh Circuit
November 2, 2004

Before Hon. FRANK H. EASTERBROOK, *Circuit Judge*

CHRISTOPHER PEASE, VINCE VITI, WILLARD BERGE, et al., Plaintiffs-Appellants,	]	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 04-1928 v.	]	No. 02 C 6756
PRODUCTION WORKERS UNION OF CHICAGO AND VICINITY, LOCAL 707; RANDALL INDUSTRIES, INCORPORATED, and RANDALL RENTS OF INDINA, Defendants-Appellees.	]	James F. Holderman, Judge.

Upon consideration of the MOTION TO RECONSIDER OR ALTERNATIVELY MOTION FOR LEAVE TO FILE PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC, filed on November 12, 2004, by counsel for the appellees Randall Industries, Incorporated and Randall Rents of Indiana,

IT IS ORDERED that the motion is DENIED. Our reference to timeliness in the November 2, 2004 order was not a suggestion that there is a formal deadline for filing a motion for sanctions, rather it merely conveyed the notion that sanctions should have been requested in advance of decision. A post-decision request compels the court to revisit a decided appeal, a step that should be reserved for exceptional matters, of which this is not one. Additionally, the rules do not provide for en banc review of such decisions.

CHRISTOPHER PEASE, VINCE VITI, WILLARD BERGE, and MICHAEL GEAR, Plaintiffs-Appellants, v. PRODUCTION WORKERS UNION OF CHICAGO AND VICINITY LOCAL 707; RANDALL INDUSTRIES, INC.; and RANDALL RENTS OF INDIANA, INC., Defendants-Appellees.

No. 04-1928

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

386 F.3d 819; 2004 U.S. App. LEXIS 21488; 175 L.R.R.M. 3065; 150 Lab. Cas. (CCH) P10,404

September 28, 2004, Argued
October 15, 2004, Decided

SUBSEQUENT HISTORY: As Amended October 25, 2004. Rehearing denied by Pease v. Prod. Workers Union of Chi. & Vicinity Local 707, 2004 U.S. App. LEXIS 24227 (7th Cir. Ill., Nov. 9, 2004)

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 02 C 6756. James F. Holderman, Judge. Pease v. Prod. Workers Union of Chi. & Vicinity Local 707, 2004 U.S. App. LEXIS 4055 (N.D. Ill., Mar. 12, 2004)

DISPOSITION: AFFIRMED.

CORE TERMS: seniority, collective bargaining agreement, disbelieve, abandoned, fair representation, bargaining unit, non-persuasion, abandonment, arbitration, transferred, prevailing, arbitrator's, supporter, prosecute, abandon, driver, battle, silent, hybrid, layoff, duty, duty of fair representation, longer-term, undisputed, temptation, junior, hired

COUNSEL: For CHRISTOPHER PEASE, VINCE VITI, WILLARD BERGE, MIKE GEAR, Plaintiffs-Appellants; Alexia M. Kulwiec, IUOE LOCAL 150 LEGAL DEPARTMENT, Countryside, IL USA.

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JUDGES: Before BAUER, EASTERBROOK, and MANION, Circuit Judges.

OPINION BY: EASTERBROOK

OPINION:

EASTERBROOK, *Circuit Judge*. Local 707 of the Production Workers Union and Local 150 of the Operating Engineers Union have been engaged in a long-running battle for the right to represent truck drivers and associated workers at Randall Industries. The workers have twice voted in favor of Local 707, which the NLRB has certified as their bargaining representative; the Board has rejected Local 150's contentions that the employer committed unfair labor practices during the campaigns. But Local 150 has refused to give up, and the Board has ordered it to refrain from threatening adherents to Local 707. We have enforced the Board's order and held Local 150 in contempt for violating some of its terms. Still the battle continues. In this litigation four employees (with the aid of counsel furnished by Local 150) contend that Randall failed to carry out its collective bargaining agreement with Local 707. To succeed in such an action, the employees first must show that Local 707 violated

its duty to represent them. See *DelCostello v. Teamsters*, 462 U.S. 151, 163-65 (1983) (discussing the elements of a hybrid duty-of-fair-representation and contract action); *Vaca v. Sipes*, 386 U.S. 171, 184-86 (1967) (same).

The district judge dismissed or granted summary judgment to Randall and Local 707 with respect to three employees' principal claims. See 2003 U.S. Dist. LEXIS 458 (N.D. Ill. Jan. 10, 2003); 2003 U.S. Dist. LEXIS 14751 (N.D. Ill. Aug. 22, 2003); 2003 U.S. Dist. LEXIS 20238 (N.D. Ill. Nov. 7, 2003). Other claims were submitted to a jury, which rejected all except one theory advanced by Willard Berge. The district judge then entered judgment in defendants' favor as a matter of law under Fed. R. Civ. P. 50. 2004 U.S. Dist. LEXIS 4055 (N.D. Ill. Mar. 12, 2004). All four plaintiffs have appealed, but their joint brief does not advance any argument on behalf of Michael Gear. This abandons his claim. And neither Christopher Pease nor Vince Viti seeks appellate review with respect to any theory that the jury rejected; their arguments are limited to claims that the district judge resolved before trial.

Pease appears to be engaged in bankruptcy fraud: he prosecuted this suit simultaneously with a personal bankruptcy in which he omitted from his schedule of assets the existence of this chose in action. Although the district judge rejected Randall's contention that the trustee in bankruptcy is the only entity authorized to prosecute a claim on Pease's behalf (and for the benefit of his creditors rather than Pease personally), Randall has reasserted that argument on appeal. Pease does not meet it on the merits. Instead he asks us to ignore the point, asserting that Randall's decision not to file a cross-appeal forecloses the subject. Not so. A prevailing litigant may defend its judgment on any ground preserved in the district court. See *Massachusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479 (1976). This contention was raised in the district court and thus is open to decision here.

We need not get into the subtle question whether there is any way in which a debtor in bankruptcy could prosecute a high-stakes claim such as this after concealing it from his creditors. Compare *Morlan v. Universal Guaranty Life Insurance Co.*, 298 F.3d 609 (7th Cir. 2002) (claims formally abandoned by a trustee revert to the debtor even if not scheduled, though the abandonment may be rescinded if induced by concealment), with *Leon v. Comcar Industries*, Inc., 321 F.3d 1289 (11th Cir. 2003) (employees who conceal contract or other substantial claims from their creditors cannot pursue them during or after bankruptcy). Pease's claim belongs to his creditors (represented by the trustee); and the trustee, although notified belatedly, has declined either to prosecute the litigation or to relinquish it to Pease by formal abandonment. Pease has forfeited any opportunity to argue that the trustee did abandon it to him directly or by inaction after learning of its existence. Not that Pease had much of a claim to begin with. Local 707 took his discharge to arbitration and lost, following detection of another fraud: he did not have the sort of driver's license that he falsely had told Randall that he possessed and that was essential to his employment. None of the criteria for upsetting an arbitrator's award is even arguably satisfied.

Viti was laid off about a month after his hire. As the most junior employee, he was most exposed to the vagaries of business, and it is undisputed that Randall reduced its staff after demand for its services slackened. Last hired, first fired, is what the collective bargaining agreement provided. It does not matter whether Viti had graduated from "probationary" status under the collective bargaining agreement; he was still the most junior. That Local 150 continues to argue on his behalf (and that of Pease) implies that this is vexatious litigation.

This leaves Berge, who advances several theories. The one on which the jury voted in his favor is that Randall departed from the collective bargaining agreement when it

laid him off in favor of Roy Walker. Berge was hired in August 2001 and laid off in May 2002 in order to make room for Walker, who had more seniority than Berge as a truck driver but had been working in sales for the previous seven months. Walker testified, without contradiction, that he had been promised when he transferred to the sales position that he could go back to driving if the new job did not pan out. Berge insists, however, that the instant Walker left the bargaining unit he lost all his seniority, so that he could not displace any other employee. Randall and Local 707 took the view that workers who transfer from one job to another at Randall do not lose seniority—at least, that such an internal transfer should be treated no worse than a layoff, and the collective bargaining agreement provides that seniority lasts for a year following a layoff. Local 707 therefore supported Walker, and by doing this (Berge insists) deprived him of the "fair representation" that unions must provide to everyone they represent. The jury heard evidence that Local 707 was hostile to Local 150 and its supporters, of whom Berge was one. It also heard evidence that Local 707 and Randall had an understanding, in place before Walker bumped Berge, that workers who transferred to other positions at Randall kept their seniority in the event of a return to the bargaining unit. It was this evidence, which the district judge viewed as undisputed, that led to the Rule 50 judgment in defendants' favor.

According to Berge (and Local 150), the jury was free to disbelieve the sole witness who testified about this understanding, which had not been reduced to writing. And if the jury could disbelieve the testimony, Berge insists, then it also could find that Berge had the superior right to the position, for he had eight months' seniority and Walker had none. The argument is half right. Juries can reject testimony, but doing so is not the same thing as evidence to the contrary. See, e.g., *Krist v. Eli Lilly & Co.*, 897 F.2d 293 (7th Cir. 1990). That's an old, and very important, ingredient in the

law of evidence. A jury's decision to disbelieve a witness (or conclude that the witness did not have an opportunity to observe or learn what happened) is consistent with that witness's proposition being true. Someone else may have had better knowledge, or better memory, or better ability to relate and thus to persuade. And if there is no other witness—as there was none in this case—that leaves a hole in the record. We do not know whether the proposition is true or false. (The wrinkle noted in *United States v. Zafiro*, 945 F.2d 881, 888-89 (7th Cir. 1991), affirmed on other grounds, 506 U.S. 534 (1993)—that disbelief of a criminal defendant's exculpatory testimony can imply consciousness of guilt and thus, like flight to avoid prosecution, add to the evidence in support of conviction—is not applicable here, and we need not discuss how far this proviso extends. See *Stallings v. Tansy*, 28 F.3d 1018 (10th Cir. 1994); *United States v. Zeigler*, 994 F.2d 845 (D.C. Cir. 1993).) When the record is silent, all turns on who had the burden of persuasion (better, the risk of non-persuasion) with respect to the point. See *EEOC v. G-K-G, Inc.*, 39 F.3d 740, 746-47 (7th Cir. 1994); *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983).

So let us throw out the testimony about prevailing practices and see what happens. The answer is that Berge, as the plaintiff, is no better off, for a plaintiff bears the risk of non-persuasion. The collective bargaining agreement is silent about how internal transfers affect seniority; it is not as if Randall needed to show that there had been an oral modification of the agreement. Transfers are un-provided-for situations—and unless something requires transferees to *lose* their seniority, then they retain it.

Given the lack of provision in the collective bargaining agreement, it is impossible to see how Local 707 could be deemed to have abandoned its duty of fair representation when it took the position that Walker retained his seniority. Unions regularly fight tooth and nail to establish seniority systems and avoid forfeitures of that

benefit, which favors longer-term workers (and longer-term members!) over newcomers. Local 707 behaved according to expectations. Had the union instead supported Berge, then Walker would have had a much stronger claim that it had violated its duty.

Solving intra-workplace conflicts by seniority and negotiation is a principal function of labor unions. Federal law encourages the sort of thing that Local 707 did. Conflicting claims are worked out amicably between unions and employers, not in litigation that puts the law of the shop to a jury that may know little about the participants' reasonable expectations or the exigencies of industrial relations. Federal labor law ensures that disputes of this kind are resolved by the affected parties over the bargaining table, or by arbitrators knowledgeable about the business, rather than in court. That's why a hybrid contract/DFR suit does not get to first base unless the worker shows that the union has abandoned him to the wolves.

Welcoming support—Local 707 naturally thought better of those who favored its role and opposed Local 150's efforts to oust it—differs from abandoning anyone. Many a union (or public agency, for that matter) faithfully protects its political opponents—often from a sense of duty, and if that is lacking from a desire to improve its prospects of reelection. Recall that Local 707 took the Pease discharge to arbitration despite the claim's weakness. Local 707 had a temptation to disfavor Berge, but did it yield to temptation? In the language of criminal law, where's the *actus reus*? Of that there is no evidence. Berge does not contend that, when the roles were reversed—when a supporter of Local 150 moved from one job to another—Local 707 contended that the transfer stripped the employee of seniority. Nothing in this record so much as hints that any defender of Local 707 has been treated better than Berge under similar circumstances. So the case should not have gone to trial. No reasonable jury could find that Local 707 failed to afford Berge objectively

even-handed representation. That it resolved a conflict between two workers is not a reason to hand the ultimate decision to a panel of six laymen. A union can be mistaken in its understanding of the collective bargaining agreement without departing from its duty of fair representation; otherwise every claim of error would lead to a jury trial, and the need to show a denial of fair representation would merge into the merits.

Plaintiffs' other arguments have been considered and need not be discussed.

AFFIRMED

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 38 Frivolous Appeal – Damages and Costs

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Fed. R. App. 38 (amended April 29, 1994)

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Christopher Pease, Willard Berge, and Mike Gear,	)	
Plaintiffs,	)	No. 02 C 6756
v.	)	
Production Workers Union of Chicago and Vicinity Local 707, Randall Industries, Inc., and Randall Rents of Indiana	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

On January 15, 2004, a jury returned a verdict in favor of plaintiff William Berge ("Berge") and against defendants Randall Industries, Inc. and Randall Rents of Indiana (collectively "Randall") and Production Workers Union of Chicago and Vicinity Local 707 ("Local 707") on his claim that Randall violated the seniority provisions of the collective bargaining agreement ("CBA") by terminating him stead of another employee with less job classification

seniority and that Local 707 breached its duty of fair representation. By special verdict, the jury found that Randall had violated the seniority provisions of the CBA and that Local 707 had acted in bad faith in failing to represent Berge. (Berge Claim One Verdict Form). The jury awarded Berge $9,061.76 in damages, allocated evenly between Randall and Local 707. (Berge Damages Verdict Form at 2.) In addition, the jury returned a verdict in favor of defendants on Berge's claim that Randall terminated its employment of him because of his support for International Union of Operating Engineers, Local 150 ("Local 150") in violation of the CBA and that Local 707 breached its duty of fair representation. The jury also found in favor of defendants with respect to each of the claims of plaintiffs Christopher Pease ("Pease") and Mike Gear ("Gear"). On January 26, 2004, Local 707 filed a renewed motion for judgment as a matter of law and alternative request for a new trial. On January 27, 2004, Randall filed a similar motion. For the

following reasons, the motions for judgment as a matter of law are granted.

STATEMENT OF FACTS[1]

Berge worked as a truck driver at the Randall Rents facility in Portage, Indiana from about August 30, 2001, to May 15, 2002. At that time, Roy Walker ("Walker") and Gear were truck drivers with greater seniority than Berge. All three of these Randall employees, Berge, Gear, and Walker, were covered by the CBA between Randall and Local 707. After training Berge, in October 2001, Walker moved to the rental coordinator position at Randall, a non-bargaining unit position. (Tr. at 596, 646-47.) In May 2002, Randall moved Walker back to the bargaining unit truck driver position and terminated Berge. (Tr. at 489, 596.)

Berge then filed a grievance claiming that Randall violated Article XIII of the CBA when it terminated him instead of Roy Walker. The grievance did not proceed to

[1] The Statement of Facts is derived from the evidence presented at trial. Trial transcript page citations have been provided herein.

arbitration. The evidence at trial showed that Local 707 did not assist Berge in writing his grievance (Tr. at 427-28) and that Berge was mocked and called "Mr. 150" (Tr. at 358).

In effect from June 1, 1999, through May 31, 2002, the CBA between Randall and Local 707 contained the following provision, in relevant part, regarding seniority:

> **ARTICLE XIII – SENIORITY & BIDS**
>
> Job classification seniority will operate for all promotions, layoffs, re-employment, the selection of shifts, overtime work and vacation, provided that the individual can perform the available job in a reasonably satisfactory manner. An employee loses all seniority after having been laid off for twelve (12) consecutive months.

The CBA did not include a zipper clause or other similar provision that would limit the parties' ability to modify or amend the CBA. Moreover, the CBA did not contain an integration clause limiting the CBA to its express, written terms.

The evidence at trial established that Walker approached Randall about moving to a sales position at Randall. (Tr. at 569, 646.) After discussing the matter, the

parties agreed that Walker would move into the rental coordinator position, a non-bargaining unit position. (Tr. at 646-47.) Kerry Orrock, the manager at Randall Rents of Indiana, testified that upon moving to the new position, "the situation was that if it didn't work out for the company or [Walker] didn't like it, he could always go back to being a driver." (Tr. at 647.) In addition, Randy Truckenbrodt, the owner of Randall Industries, testified that it was the practice at Randall to allow an employee the opportunity to return to a prior position after accepting a new position. (Tr. at 491-92.) When Walker was transferred to the rental coordinator position, he was not covered by the CBA. (Tr. at 435, 596, 651.) In addition, during his time as rental coordinator, union dues were not withheld from Walker's paycheck. (Tr. at 597-98.)

Furthermore, Chuck Truckenbrodt ("C. Truckenbrodt), Randall's day-to-day administrative officer, prior to transferring Walker to the non-bargaining unit rental coordinator position, spoke with Local 707

business agent and organizer Edgar Roman ("Roman") regarding the impact of such a transfer on Walker's seniority. (Tr. at 570, 635-36.) C. Truckenbrodt testified that Roman said, regarding the transfer, that "we treat it the same way we treat a layoff. You're away from your work for up to a year, you get to retain your – as if it was a layoff. You're not available for your work now, and you retain your seniority if you go back, just as if you were called back." (Tr. at 635-36.) Based on this conversation with Roman, when Walker returned to the driver position in May 2002, Randall and Local 707 concluded that Walker had retained his seniority within the driver job classification because he had been in the rental coordinator position for less than one year. As such, in May 2002, when Walker returned to the truck driver position, he was more senior than Berge. At that time, Randall needed only two truck drivers, and of the three truck drivers, Berge, Gear, and Walker, Berge was the least senior driver. Consequently, Randall terminated Berge.

Randall argues in its renewed motion for judgment as a matter of law that the jury's verdict was contrary to the undisputed evidence that Walker was laid off within the meaning of the CBA and therefore retained his seniority within the truck driver job classification. Local 707 contends that the evidence does not support the jury's finding of bad faith. These arguments will be addressed below.

STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 50, this court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue . . . ." FED. R. CIV. P. 50(a)(1). As the Supreme Court has made clear, "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000) (citations omitted). Thus, this court should review all of the evidence in the record and draw all

reasonable inferences in favor of the nonmoving party, here Berge. Moreover, this court may not make credibility determinations or weigh the evidence. Id. Finally, and particularly important in this case, this "court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." Id. at 151 (citation omitted). In interpreting this directive from the Supreme Court in Reeves, the Seventh Circuit has held that the uncontroverted testimony of a company employee must be given credence. Traylor v. Brown, 295 F.3d 783, 791 (7th Cir. 2002). The court pointed out that to hold otherwise "would essentially prevent any employer from prevailing at the summary judgment [or judgment as a matter of law] stage because an employer will almost always have to rely on the testimony of one of its agents to explain why the agent took the disputed action." Id.

ANALYSIS

Berge, along with the other plaintiffs, filed what is commonly known as a hybrid suit against the defendants. As the Supreme Court has held, "[t]o prevail against either the company or the Union,. . . [Berge] must not only show that [his] discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union." DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 165 (1983). In other words, to prevail on his hybrid claim, Berge must prove by a preponderance of the evidence that Randall breached the CBA and that Local 707 breached its duty of fair representation. McLeod v. Arrow Marine Transp., Inc., 258 F.3d 608,613 (7th Cir. 2001). A union breaches the duty of fair representation only if its actions are arbitrary, discriminatory, or in bad faith. Neat v. Newspaper Holdings. Inc., 349 F.3d 363, 369 (7th Cir. 2003). In addition, the Seventh Circuit has made clear that "[e]ach of these possibilities must be considered separately in

determining whether or not a breach has been established." Id.

I. Breach of the CBA

Before moving Walker into the rental coordinator position, the undisputed evidence established that Randall's administrative officer C. Truckenbrodt talked with Local 707's business agent Roman to determine what effect the move would have on Walker's seniority. (Tr. at 570, 63 536.) Just prior to the transfer, Walker was the most senior driver at Randall Rents of Indiana. C. Truckenbrodt testified that it was Randall's and Local 707's policy that a bargaining unit member who laterals into a non-bargaining unit position does not lose his or her seniority, rather, the employee's seniority is preserved should he or she transfer back into the collective bargaining unit (Tr. at 635.) More importantly, Roman told C. Truckenbrodt that Local 707 treats such a transfer as a layoff. (Tr. at 635-36.) Under the terms of the CBA, an employee loses his or her seniority after having been laid off for twelve consecutive months, and therefore,

retains his or her seniority during the first twelve months of a layoff. (CBA, Art. XIII.) In other words, the undisputed trial evidence established that Randall and Local 707 had agreed that the term "laid off" included a transfer, like in Walker's situation, to a non-bargaining unit position.[2] Consequently, for the first twelve months of the transfer, as with a layoff, the laid off employee retains his or her seniority rights.[3]

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[2] The Seventh Circuit has held that "a collective bargaining agreement may be partly or wholly oral as well as partly or wholly in writing, and a written collective bargaining agreement may be orally modified." Merk v. Jewel Food Stores Div. of Jewel Cos., Inc., 945 F.2d 889, 895 (7th Cir. 1991). Here, although not explicitly written, the undisputed evidence is clear that Randall and Local 707 had agreed that transfers to non-bargaining unit positions were treated as layoffs.

[3] Berge argues that because Randall did not fully address its position with respect to transfer and seniority rights, including the conversation between C. Truckenbrodt and Roman, in its trial brief, it is precluded from doing so in its renewed motion for judgment as a matter of law. Berge's sole authority for this is a reference to the form pre-trial order included with this district's Standing Order Establishing Pretrial Procedure. Endnote 10 to the form pre-trial order states that "[t]rial briefs are intended to provide full and complete disclosure of the parties' respective theories of the case." Nothing supports Berge's argument that a party's failure to include a position in the trial brief precludes that party from ever advancing such a position at a later time. In addition, Berge cannot claim that he was surprised by Randall's contention, as Randall stated in the Final Pre-trial Order that a contested issue of fact

This agreement to treat an employee transferred to a position outside the bargaining unit as a laid off employee is consistent with the principles of labor law and the past practices of Randall and Local 707. Local 707 owes each of its members of a duty of fair representation. It must take into account the rights and interests of each of its members and of the membership as a whole. Local 707's position with respect to layoffs applies uniformly to all Local 707 members. Local 707 trustee Susan Schreiner testified that Local 707 did not believe that Walker lost his seniority when he moved into the rental coordinator position because "[t]he union wants a member to be able to advance without the risk of being terminated by doing so. The union wants the seniority to follow so that in the event a position does not work out, the member is not out of a job." (Tr. at 737-38)

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concerned whether Walker retained his seniority when he returned to his previous job classification within twelve months. (Final Pre-trial Order, Sch. A., Def. Randall's Stmt. Of Contested Facts ¶ 20.) Thus, this court is not prevented from considering Randall's arguments.

Such a policy was not created specially for Walker. If Berge would have transferred to a non-bargaining unit position, Randall and Local 707, pursuant to the CBA, would have treated such a move as a layoff. Consequently, if Berge would have returned to the bargaining unit within the first twelve months, he would have retained his seniority rights. In fact, when Berge's co-plaintiff Pease moved out of his bargaining unit position for less than twelve months, Randall continued to treat his seniority date as his date of hire, August 14, 2000, not the date he returned or moved to the bargaining unit. (Tr. at 29,34-35,147,491-92; Def. Randall Tr. Ex. 41.)

The testimony of C. Truckenbrodt on this issue was undisputed at trial. Berge's counsel did not address the parties' interpretation of "laid off" during the cross-examination or re-cross examination of C. Truckenbrodt or during his direct examination of Roman. Thus, C. Truckenbrodt's testimony must be given credence. Traylor, 295 F.3d at 791. Even if Berge had been surprised by C. Truckenbrodt's testimony on this point during

Randall's case-in-chief, Berge could have called Roman as a rebuttal witness and disputed C. Truckenbrodt's testimony. Moreover, Berge's counsel did not address the issue of Randall and Local 707's understanding of "laid off" in his initial closing argument. In his rebuttal argument, however, Berge's counsel made his only attack at trial on the issue of whether an agreement between Randall and Local 707 regarding layoffs and transfers ever took place. Berge's counsel argued:

> [Local 707] didn't say that we had a deal with the company. The company says we had a deal.
>
> Where was the 707 witnesses? Where was – the agreements take two parties. There's two sides that have to agree. What 707 witness said, "We agreed to let Walker come back. We had a previous deal that agreed to let him come back"? Where was that testimony?
>
> Where was Mr. Walker? He's the guy who supposedly was the beneficiary of this. He's the one who supposedly would know about this agreement. He didn't testify either.
>
> I mean, this is all holes.

(Tr. at 862-63.) It was misleading for Berge's counsel to argue that somehow Randall had failed at its obligation to present sufficient evidence on this issue when in fact the only

evidence presented at trial pointed undisputably in favor of Randall and had never been questioned by Berge's counsel during the presentation of the evidence. This court believes that the above quoted rebuttal argument by Berge's counsel, which was erroneous under the facts and the law and which Randall had no opportunity to counter, caused the jury to make the unreasonable finding it made in returning a verdict in Berge's favor.

As stated above, the evidence regarding the parties' agreement to treat a transfer as a layoff was uncontroverted. Berge's counsel's misleading statement, which told the jury that Randall had to prove more than Randall had proven, was improper rebuttal argument. Berge had never disputed the evidence on this issue. Indeed, Randall had undisputedly proved its theory by a preponderance of the evidence. Randall's proof was uncontroverted, and therefore, it had met its burden. Any argument to the contrary, or jury finding to the contrary, was unreasonable.

As the Seventh Circuit has held, "a plaintiff cannot avoid summary judgment [or judgment as a matter of law] by merely claiming a jury could disbelieve the employer's reason." Traylor 295 F.3d at 791 (holding that in a Title VII case, a plaintiff cannot defeat summary judgment by simply arguing that the jury *could* disbelieve the employer's proffered legitimate, nondiscriminatory reason). This is the precise tactic Berge's counsel used in rebuttal argument. The Supreme Court held many years ago, "the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt." Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209, 216 (1931). In the case at hand, the jury, prompted by Berge's counsel's erroneous rebuttal argument, disregarded C. Truckenbrodt's unimpeached testimony. As a result, the verdict cannot stand and must be set aside.

Berge is correct that the jury is allowed to draw reasonable inferences supported by the record. (Resp. at 4.) However, because C. Truckenbrodt's testimony was uncontroverted by any evidence and remained undisputed when the parties rested at the close of all the evidence, Randall was under no obligation to provide further corroboration of this undisputed fact or to call a Local 707 representative to the stand. The jury cannot simply disregard the undisputed evidence of C. Truckenbrodt, as Berge argued in rebuttal and still argues. Just like the rebuttal argument at trial, Berge claims in his consolidated response to defendants' renewed motions for judgment as a matter of law that "the jury was permitted to infer from the absence of any Local 707 testimony supporting Mr. Truckenbrodt's allegation that no such agreement existed. Nor did Mr. Roy Walker testify as to what had occurred between the parties concerning his seniority. Again, the jury could infer from the lack of supporting testimony that no such oral agreement had been reached." (Resp. at 5.) This is factually and legally

incorrect. Once a party presents evidence as to a fact under a preponderance of the evidence standard, unless that evidence is impeached in some manner or evidence disputing that fact is presented, the fact has been proven. To find otherwise would be contrary to the Seventh Circuit's reasoning in Traylor, 295 F.3d at 791.

Berge is also incorrect that Randall and Local 707's agreement as to the scope of the term "laid off" in the CBA cannot be considered. Parol evidence is not implicated here because statements made prior or contemporaneous with the making of the contract are not at issue. Based on the undisputed evidence, it is clear that prior to transferring Walker the parties simply clarified their prior agreement. The evidence supports only one reasonable inference–i.e., that the parties had agreed that "laid off" includes having been transferred to a non-bargaining unit position. This was clearly the understanding of both Local 707 and Randall prior to Walker's transfer. In light of the unrefuted definition of "laid off" as used in the CBA, the jury was unreasonable to

find for Berge. The conversation between C. Truckenbrodt and Roman merely confirmed their prior understanding.

Any finding to the contrary is not supported by the evidence and is against the undisputed manifest weight of the evidence. Such a fording must be set aside.

II. Bad Faith

In addition, the jury's finding that Local 707 acted in bad faith (Berge Claim One Verdict Form) is not supported by a legally sufficient evidentiary basis. As this court instructed the jury, without objection from either party:

> Whether or not a union's actions are in bad faith calls for a subjective inquiry and requires proof that the union acted, or failed to act, due to an improper motive. To show bad faith, plaintiffs must identify conduct by Local 707 union officials that would support a reasonable inference of bad faith on the part of Local 707. Conduct is in bad faith when it is designed to mislead someone by fraud, deceit, or dishonest action.

(Jury Instructions at 19.) At trial, Berge did not identify specific conduct that would support a reasonable inference that Local 707 attempted to mislead Berge by fraud, deceit, or dishonest action. In his consolidated response to

defendants' renewed motions for judgment as a matter of law, Berge points to the following evidence to support the jury's finding of bad faith: Local 707 knew that Berge supported Local 150; Local 707 mocked Berge and called him "Mr. 150"; Local 707 failed to assist Berge in preparing or presenting his grievances; and Local 707 failed to adequately investigate Berge's grievances. (Resp. at 10-11.)

Nowhere, however, does Berge explain how any of these amount to conduct by Local 707 designed to mislead by fraud, deceit, or dishonest action. In fact, in his closing argument to the jury, Berge's counsel argued that Local 707 acted arbitrarily and discriminated against Berge, but he did not point to any evidence supporting a bad faith finding, nor did he even mention bad faith. (Tr. 794-97.) Clearly, the jury rejected the arguments regarding arbitrariness and discrimination, as it found by special verdict that Local 707's representation of Berge was not arbitrary or discriminatory. (Berge Claim One Verdict Form.)

Furthermore, Berge points to no evidence supporting a finding that Local 707 subjectively acted in bad faith, as is required by the law. See Konen v. Int'l Bhd. of Teamsters, Local 200, 255 F.3d 402,408 (7th Cir. 2001) (holding that for the non-moving party to survive summary judgment, and thus judgment as a matter of law, "he must identify conduct by union officials that would support a reasonable inference of bad faith," including the subjective motivation behind the union's decision not to arbitrate his grievance). Finally, the undisputed facts discussed in the previous section of this opinion provide the only reasonable explanation as to why Local 707 failed to pursue Berge's grievance to arbitration: Local 707 believed, based on the agreed-upon provisions of the CBA governing all bargaining unit employees, that Walker had been "laid off" and thus retained his seniority rights when he returned to the driver position. At that time, because Walker had greater seniority than Berge, Berge had no valid grievance, and Local 707 knew that pressing such a grievance to arbitration would have been meritless. See

Crider v. Spectrulite Consortium, Inc., 130 F.3d 1238, 1244 (7th Cir. 1997) (finding that union did not act in bad faith when it refused to take a grievance to arbitration when, based on its reasonable interpretation of the collective bargaining agreement, it believed that the grievant's position was meritless). As this is the only reasonable explanation supported by the undisputed facts, the jury was unreasonable in finding that Local 707 acted in bad faith, and judgment as a matter of law must be entered for the defendants.

CONCLUSION

For the reasons explained above, defendant Randall's and defendant Local 707's renewed motions for judgment as a matter of law are granted. Judgment is ordered entered in favor of defendants Randall and Local 707 and against plaintiff Berge. Pursuant to Rule 50(c)(i), because the dispositive facts are uncontroverted and the verdict was against the clear weight of the evidence, defendants' alternative requests for a new trial are conditionally granted.

ENTER:

JAMES F.
HOLDERMAN
United States District
Judge

DATED: March 12, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Christopher Pease, Willard Berge, and Mike Gear,	)	
Plaintiffs,	)	No. 02 C 6756
v.	)	
Production Workers Union of Chicago and Vicinity Local 707, Randall Industries, Inc., and Randall Rents of Indiana	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

On January 21, 2003, plaintiffs Christopher Pease ("Pease"), Vince Viti ("Viti"), Willard Berge ("Berge"), and Mike Gear ("Gear") filed a four-count first amended complaint against defendants Production Workers Union of Chicago and Vicinity Local 707 ("Local 707"), Randall Industries, Inc., and Randall Rents of Indiana alleging breach of duty of fair representation and breach of contract claims under Section 301 of the Labor Management Relations Act

("LMRA"), 29 U.S.C. § 185. On September 23, 2003, all parties moved, pursuant to Federal Rule of Civil Procedure 56, for summary judgment. For the reasons explained below, plaintiffs' motion is denied in part and granted in part, and defendants' motion is denied in part and granted in part.

STATEMENT OF UNDISPUTED FACTS[1]

Defendant Randall Industries, Inc. is an Illinois corporation with facilities located in Elmhurst, Illinois. Defendant Randall Rents of Indiana is an Indiana corporation with facilities in Portage, Indiana. The businesses (collectively "Randall") are engaged in wholesale and retail sale and service of aerial lift and other construction equipment. From June 1, 1999, through May 31, 2002, Randall and Local 707 were parties to a "Labor Contract and Working Agreement" ("CBA"). All four plaintiffs were employed by Randall, and all four plaintiffs openly supported

[1] The Statement of Undisputed Facts is drawn from plaintiffs' and defendants' 56.1(a) statements of undisputed facts, 56.1(b) responses to statements of undisputed facts, statements of additional undisputed facts, and responses thereto.

the International Union of Operating Engineers, Local 150, AFL-CIO in it February 2002 organizing campaign to represent Randall employees.

Plaintiff Pease worked as a truck driver at Randall's Elmhurst facility from August 14, 2000, to February 21, 2002, on which day he was terminated. On March 6, 2002, Local 707, on behalf of Pease, filed several grievances against Randall, one of which was that Pease was terminated in violation of the CBA. On July 10, 2002, after a hearing on June 25, 2002, Arbitrator Dennis Stoia determined that Randall did not violate the CBA when it terminated Pease.

Plaintiff Vince Viti worked as a mechanic at Randall's Elmhurst facility from the end of December 2001 to February 20, 2002, when he was terminated. Prior to working directly for Randall, Viti worked as a mechanic at Randall's Elmhurst facility while employed by a temporary agency, Sure Staff. At the time Viti was terminated, he had the least seniority of any Randall employee.

On March 26, 2002, Local 150, on behalf of Pease and Viti, filed unfair labor practice charges with the NLRB against Randall alleging that Randall had unlawfully terminated these plaintiffs because of their support for Local 150. The NLRB Regional Director, after investigation, dismissed Pease's and Viti's charges. Finally, on July 12, 2002, a hearing was heard before an NLRB hearing officer in a representation proceeding challenging an election at Randall and the ballots of four employees, including Pease and Viti. After hearing testimony and reviewing the exhibits introduced by Local 150 and Randall, the hearing officer found that these plaintiffs were terminated because of a serious downturn in Randall's business. On October 10, 2002, the NLRB adopted the hearing officer's findings and determinations.

Plaintiff William Berge was a truck driver at Randall's Portage facility from August 30, 2001, to May 15, 2002, when he was terminated. After termination, Berge filed several grievances against Randall alleging that it had

violated its labor contract with Local 707. On August 23, 2002 (amended on September 5, 2002), Local 150, on behalf of Berge, filed an unfair labor practice charge with the NLRB alleging that Randall decreased Berge's work hours because of his support for Local 150. After investigation, the NLRB Regional Director dismissed the charge.

Plaintiff Mike Gear also worked as a truck driver at Randall's Portage facility. On April 15, 2002, Gear worked half a day and then left work. Gear claims he was injured at work and went to a medical clinic. Gear did not fill out an injury report, provide Randall with a doctor's note, or file a workers' compensation claim. The CBA requires employees to be paid for a minimum of thirty-two hours of work per week. (Randall's 56.1 Stmt. as to Gear, Ex. C at 7, Art. VI, Sect. 2.) However, the CBA goes on to state that an employee forfeits his weekly minimum guarantee if he takes off work on his own initiative. (Randall's 56.1 Stmt. as to Gear, Ex. C at 7, Art. VI, Sect. 3.) On August 23, 2002 (amended on September 5, 2002), Local 150, on Gear's

behalf, filed an unfair tabor practice charge with the NLRB alleging that Randall refused to pay Gear his contractually-guaranteed thirty-two hours of work per week because of his support for Local 150. After investigation, the NLRB Regional Director dismissed the charge.

STANDARD OF REVIEW

Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In ruling on a motion for summary judgment, the evidence of the nonmovants must be believed and all justifiable inferences must be drawn in the nonmovants' favor. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986). This court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. A party who bears the burden of proof on a particular issue, however,

may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). In considering a motion for summary judgment, this court is not required to scour the record in search of evidence to defeat a motion for summary judgment; the nonmoving party must identify with reasonable particularity the evidence upon which that party relies. Johnson v. Cambridge Indus., Inc., 325 F.3d 892, 898 (7th Cir. 2003); Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 562 (7th Cir. 1996). The evidence relied upon must be competent evidence of a type otherwise admissible at trial. Stinnett v. Iron Works Gym/Executive Health Spa, Inc., 301 F.3d 610, 613 (7th Cir. 2002).

ANALYSIS

Plaintiffs advance what is referred to as a hybrid suit because it is comprised of two causes of action that, as the Supreme Court has stated, are "inextricably interdependent." DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 164

(1983). According to the Supreme Court, "[t]o prevail against either the company or the Union, ... [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union." Id. at 165. In other words, to maintain a § 301 claim against Randall, plaintiffs must establish that Local 707 breached its duty of fair representation. McLeod v. Arrow Marine Transp., Inc., 258 F.3d 608, 613 (7th Cir. 2001). "A union breaches its duty to fairly represent its members where its conduct toward one of its members is 'arbitrary, discriminatory, or in bad faith.'" Id. (quoting Crider v. Spectrulite Consortium, Inc., 130 F.3d 1238, 1243 (7th Cir. 1997)).

I. Plaintiffs' Motion for Summary Judgment

A. As to Plaintiffs' Claims

As discussed above, to prevail against either Randall or Local 707, plaintiffs must prove two elements: (1) that Local 707 breached its duty of fair representation by treating plaintiffs in an arbitrary or discriminatory manner or in bad

faith; and (2) that Randall violated the CBA. Viewing the evidence in the light most favorable to defendants, as this court must, it is evident that material facts exist as to the first element of plaintiffs' claims, i.e., whether Local 707 breached its duty of fair representation. Basically, each plaintiff argues that although Local 707's leadership admitted that Local 707 had an obligation to fully, fairly, and thoroughly investigate all potential grievances, gather facts, and make an objective determination as to whether or not to pursue a grievance, Local 707 failed in practice to do these things. Plaintiffs allege that Local 707 simply took Randall's management's word as to the merits of plaintiffs' grievances and failed to question management or investigate the grievances or management's reasons for denying them. Plaintiffs also claim that Local 707 refused to help plaintiffs draft or revise grievances, formulate theories, or assist them in any way. Additionally, plaintiffs assert than any assistance rendered was perfunctory and cursory. Further, plaintiffs allege that Local 707 failed to train its agents on how to

properly handle grievances. Finally, plaintiffs argue that Local 707 failed to adequately represent plaintiffs in bad faith due to plaintiffs' support for Local 150.

Even a cursory review defendants' 56.1(b) responses shows that defendants, and Local 707 more specifically, dispute each of plaintiffs' allegations.[2] Local 707 points to evidence in the record establishing that its union officials did assist plaintiffs in filing, investigating, and pursuing grievances. Local 707 further contends that some or all plaintiffs failed to follow the proper grievance procedures or directions of Local 707 officials. Finally, defendant union denies taking management's word over plaintiffs' and argues

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[2] In responding to plaintiffs' motion, both the Randall defendants and Local 707 complained of difficulty in addressing plaintiffs' 56.1(a) statement of undisputed facts. After reviewing plaintiffs' 56.1(a) statement, this court agrees that plaintiffs' paragraphs are not "short," with some paragraphs running close to one full page. Not only has this made it difficult for defendants to respond, but plaintiffs' 56.1(a) statement has unnecessarily complicated and convoluted the record for this court. However, this court believes that plaintiffs' transgression of the Local Rules is not so egregious as to warrant this court to strike the statement as defendants have requested but admonishes plaintiffs' counsel to comply fully with the Local Rules in the future in this case.

that it had no duty to pursue grievances on behalf of Viti. Clearly, material facts are in dispute. Believing defendants' version of the facts, no finder of fact could determine that Local 707 breached its duty of fair representation. Consequently, plaintiffs' motion for summary judgment is denied. Because material facts are in dispute as to Local 707's beach of its duty of fair representation and plaintiffs must prove such breach to prevail against Randall, this court need not discuss plaintiffs' evidence of Randall's breach of the CBA.

B. As to Randall's Affirmative Defenses

Plaintiffs also move for summary judgment on several of defendant Randall's affirmative defenses. In its memorandum in opposition, Randall did not respond directly to any of plaintiffs' arguments regarding affirmative defenses. First, plaintiffs claim they are entitled to summary judgment on Randall's second (failure to exhaust administrative remedies), fifth (no jurisdiction), and sixth (administrative res judicata) affirmative defenses. As this

court ruled in its January 10, 2003, memorandum opinion and order regarding defendants' motion to dismiss, this court does have subject matter jurisdiction over plaintiffs' claims. In addition, as will be explained below, plaintiffs' claims are not barred under the doctrine of administrative res judicata. Moreover, Randall fails to develop any record with respect to the failure to exhaust administrative remedies defense. Consequently, plaintiffs are entitled to summary judgment on Randall's second, fifth, and sixth affirmative defenses.

Second, plaintiffs move for summary judgment on Randall's third affirmative defense (mitigation of damages). Looking at the parties' 56.1 statements, it appears that plaintiffs either have obtained other employment or the mitigation doctrine is inapplicable. However, it is not clear, because the parties have not addressed the issue, whether plaintiffs' mitigation was adequate under the law. Thus, summary judgment must be denied, and this issue will be addressed at trial. Third,

plaintiffs argue that ERISA does not preempt Pease's[3] and Berge's claims as alleged in Randall's fourth affirmative defense. Randall has not addressed this issue in any of its filings. The court, therefore, finds that Randall has abandoned this defense. Accordingly, summary judgment is granted as to Randall's fourth affirmative defense.[4]

II. Defendants' Motion for Summary Judgment

A. Local 707's Breach of Its Duty of Fair Representation as to Pease, Berge, and Gear

As discussed above with respect to plaintiffs' motion for summary judgment, material facts are in dispute as to Local 707's breach of its duty of fair representation. Viewing the facts in the light most favorable to plaintiffs, defendants are not entitled to judgment as a matter of law as to plaintiffs Pease, Berge, and Gear with respect to Local

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[3] As will be discussed in the text below, Pease has not stated a claim that Randall improperly failed to make contributions to the severance fund.

[4] It seems, as is discussed in the opinion below, that Berge's claim with respect to severance fund payments is moot anyway.

707's alleged breach of its duty of fair representation.[5] Although courts are extremely deferential to a union's decisions in handling grievances, McKelvin v. E.J. Brach Corp., 124 F.3d 864, 868 (7th Cir. 1997) (stating that union's position must be "irrational"), a reasonable factfinder could find that Local 707's actions were arbitrary or taken in bad faith. Such a determination, however, does not preclude summary judgment for defendants. Plaintiffs' claims will fail if plaintiffs cannot establish that Randall breached the CBA.

B. Randall's Breach of the CBA

Defendants[6] contend two independent bases entitle them to summary judgment even without analyzing the

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[5] As will be explained in the text below, disputed material facts remain only as to plaintiffs Pease, Berge, and Gear. The undisputed facts show that Local 707 did not breach its duty of fair representation as to Viti, and as such, as will be detailed below, defendants are entitled to summary judgment with respect to Viti.

[6] Local 707 has adopted Randall's four separate motions for summary judgment, one against each plaintiff. With respect to Pease, Viti, and Berge, Randall filed a revised memorandum in support of each of its respective motions. This court has considered these revised memoranda, not the originally filed memoranda, in deciding each of the three respective motions.

individual circumstances of each plaintiff. First, defendants claim that this court must, pursuant to Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), give deference to the Regional Director's determination to dismiss plaintiffs' unfair labor practice charges. Second, defendants maintain that Pease's and Viti's claims are barred under the doctrine of administrative res judicata (or administrative collateral estoppel).

Defendants concede that the Seventh Circuit has held that a decision by the General Counsel to not issue a complaint does not bar a subsequent lawsuit under the doctrine of collateral estoppel. Miller Brewing Co. v. Brewery Workers Local Union No. 9, AFL-CIO, 739 F.2d 1159, 1166 (7th Cir. 1984). Defendants argue that Chevron counsels that this court must give deference to the Regional Council's determination. Under the facts presented here, this court disagrees. Chevron addresses the issue of what deference is given to an administrative interpretation of a statute when a statute itself is silent or ambiguous with

respect to the specific issue at hand. Chevron, 467 U.S. at 482-83. The holding of Chevron does not apply to a discretionary decision made by one employee of the administrative agency. However, this is really beside the point. Even if this court was to defer to the Regional Counsel's decision, if material facts are in dispute, summary judgment must be denied.

As to defendants' second argument, the Seventh Circuit has held that if an action was properly before an administrative agency, the agency's decision will be given collateral estoppel effect if "'the same disputed issues of fact were before [the administrative agency] as are before the court, ... the agency acted in a judicial capacity and ... the parties had an adequate opportunity to litigate the issues before the agency.'" Frye v. United Steel Workers of Am., 767 F.2d 1216, 1220 (7th Cir. 1985) (quoting Lightsey v. Harding & Dahm & Co., Inc., 623 F.2d 1219, 1221 (7th Cir. 1980)). In the case at hand, Local 150 challenged an election at the Randall Industries shop in Elmhurst. The primary

issue before the NLRB hearing officer was whether Pease and Viti were terminated (and therefore ineligible to vote) or laid off with a reasonable expectation of returning to work in the near future (and therefore eligible to vote). The hearing officer determined that Pease and Viti were terminated due to a severe downturn in Randall's business and thus ineligible to vote in the election. Defendants argue that such determination that Pease and Viti were terminated for business reasons precludes Pease's and Viti's claims that they were unlawfully terminated for supporting Local 150.

This court disagrees with defendants. The issues before the hearing officer and this court are not identical. Although the hearing officer mentioned the fact that Pease and Viti had filed an unfair labor practice charge against Randall, she did not address the issue of unlawful termination. The exclusive purpose of the hearing was to determine the eligibility of certain voters. In other words, the officer was to find whether Pease and Viti were terminated or laid off, not whether either was terminated lawfully or

unlawfully. Defendants presumably are correct that if the hearing officer would have found that Pease and Viti were discriminatorily discharged their ballots would have counted. However, there is no evidence that this issue was considered by the hearing officer or whether she even would have entertained such evidence. In fact, she commented that the unfair labor practice charges had been dismissed and therefore did not address them. (Randall's 56.1 Stmt. as to Pease, Ex. D7 at 5.) In addition, the NLRB considers representation proceedings nonadversarial. (NLRB Casehandling Manual § 11422 ("[The hearing] is investigatory and nonadversarial.").[7]) Accordingly, because the issues before the hearing officer were not the same as

[7] Unfortunately, Pease cites to sections 11181 and 11188 of the NLRB Casehandling Manual. (Pls.' Consol. Mem. in Opp'n at 4, 5.) It appears that Pease's counsel were attempting to mislead this court, or alternatively were extremely careless in their diligence, as these sections very clearly deal with pre-election hearings, not post election challenges. This court, through its own research, found section 11422, which appears to apply in this case because Pease's and Viti's unfair labor practice charges and election challenges were not consolidated.

before this court (and more importantly, because no unfair labor practice hearing was consolidated with the representation proceeding, apparently could not have been raised before the hearing officer) and the representation proceeding was non-adversarial, collateral estoppel does not apply to bar Pease's and Viti's claims.[8]

Defendants assert that even if this court rejects its arguments above, as this court has, it is still entitled to summary judgment with respect to each plaintiff because Randall has not breached the CBA. This court will now address each plaintiff in turn.

1. Plaintiff Christopher Pease

As an initial matter, this court must clarify what claim is pending before this court. Pease contends that

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[8] The case defendants cite in support of their position, Florian v. Sequa Corp., 2001 WL 1002504 (N.D. Ill. Aug. 29, 2001), is inapposite. In that case, the court found that a hearing officer's determination in an *unfair labor practice proceeding* bars a subsequent claim based on the same issues. The case at hand deals with a representation proceeding where, as discussed in the text above, the purpose of such hearing is different from an unfair labor practice proceeding.

he has alleged more than just a claim for unlawful termination in violation of the CBA, which is set forth in paragraph 17 of the first amended complaint. In paragraph 18, plaintiff lists several grievances he filed or requested Local 707 to file on his behalf. However, Pease makes no allegations that Randall breached the CBA with respect to these grievances. It is clear from the first amended complaint that paragraph 18 applies to Local 707 only. With respect to Randall, paragraph 18 is surplusage. This reading of the first amended complaint is buttressed by comparing Pease's claims with Berge's. In paragraph 33 of the first amended complaint, Berge lists several grievances that he either filed or requested to be filed. However, unlike Pease, in addition to his unlawful termination allegation in paragraph 39, Berge goes on to state in paragraph 40 that Randall violated the CBA by denying the grievances specified in paragraph 33. Although a notice pleading is all that is required in federal court, Pease's allegations fail to put Randall on notice of any claim other than unlawful termination. Pease does not allege

in any way that Randall breached the CBA with respect to any of the grievances listed in paragraph 18 of the first amended complaint.

One other matter deserves brief mention. Pease is not challenging Arbitrator Stoia's decision; rather, he is claiming Local 707 breached its duty of fair representation in presenting his grievances to the arbitrator. As stated above, material issues of fact remain as to whether Local 707 breached its duty to Pease.

In considering Pease's unlawful termination claim, viewing the facts in the light most favorable to him, defendants are not entitled to judgment as a matter of law. A reasonable factfinder could find that Pease was terminated because of his open support of Local 150. To prevail on this claim, Pease must show that antiunion animus was a "substantial or motivating factor" in Randall's decision to terminate him. Huck Store Fixture Co. v. NLRB, 327 F.3d 528, 533 (7th Cir. 2003). "Antiunion animus is established by showing that the employees were engaged in union

activities, that the employer knew of and harbored animus toward the union activities, and there was a causal connection between the animus and the implementation of the adverse employment action." Id. If Pease makes this showing, Randall may avoid liability by establishing that it would have terminated Pease regardless of his support for Local 150. Id. If a factfinder finds that either Randall's reason dad not exist or that Randall did not actually rely on that reason, it would find in favor of Pease. Id.

In the case at hand, Pease openly supported Local 150. (Pls.' 56.1 Stmt. ¶ 15.) Shortly after such open support, Randall terminated Pease. Although suspicious timing alone may not be enough, it can be inferred based on the small size of Randal[9] that Randall knew of Pease's support of Local 150. See D& D Distribution Co. v. NLRB, 801 F.2d 636,

[9] This court was not able to find in the multiple 56.1 materials the exact number of employees at Randall. From Local 150's election challenge, the hearing officer reports that 13 employees were part of the bargaining unit. (Randall's 56.1 Stmt. as to Pease, Ex. D7 at 2.)

641 (3d Cir. 1986); NLRB v. Health Care Logistics, Inc., 784 F.2d 232, 236 (6th Cir. 1986). This court finds that based on Randall's relatively small size and the timing of Pease's termination, along with the other disputed evidence, such as whether Randall was actually facing a business downturn, whether Randall allowed a mechanic, and less senior driver, Colin Paul, to take over Pease's driving duties, and whether Randall failed to assist Pease in obtaining his CDLA license after promising to do so, a reasonable factfinder could decide that Pease's open support of Local 150 caused Randall to terminate him. Moreover, a factfinder could reject Randall's explanation of business necessity. Consequently, defendants' motion for summary judgment as to Pease is denied.

2. Plaintiff Vinci Viti

In this court's January 10, 2003, memorandum opinion and order regarding defendants' motion to dismiss, this court dismissed with prejudice Viti's claims that Randall or Local 707 violated the CBA by not filing or allowing him to file a grievance on his behalf. By any plain reading of

Count II of plaintiffs' first amended complaint, Viti has pled himself out of court. Article II, Section 5 of the CBA states that "[a] new employee shall be on probation for the first ninety (90) days of employment. During that time, his discharge shall not be subject to the grievance procedure, Article X." (Pls.' Consol. 56.1 Resp., Ex. 1 at 2.) The first amended complaint alleges that Randall hired Viti in December 2001 and terminated him on or about February 22, 2002. (First Am. Compl. ¶¶ 25, 26.) Viti attempts to get around this judicial admission by arguing in his response to defendants' summary judgment motion that he worked at Randall for more than ninety days prior to February 22, 2002, when he was employed by a temporary agency, Sure Staff. However, Viti cannot use his memoranda to amend his first amended complaint. Grayson v. O'Neill, 308 F.3d 808, 817 (7th Cir. 2002). Even if this court did allow Viti to advance the claim with evidence of his employment with the temporary agency, Viti has not introduced sufficient evidence to withstand summary judgment.

Viti argues that Sure Staff and Randall should be treated as joint employers and cites to two cases in support, NLRB v. Western Temp. Servs., Inc., 821 F.2d 1258 (7th Cir. 1987) and Lutheran Welfare Servs. of Ill. v. NLRB, 607 F.2d 777 (7th Cir. 1979). Viti fails to explain how Randall and Sure Staff are joint employers. Just a cursory glance at the case law to which Viti cites shows that the key to such analysis is whether both Randall and Sure Staff exerted significant control over the same employees, including Viti. Western Temp. Servs., 821 F.2d at 1266; Lutheran Welfare Servs., 607 F.2d at 778. Viti has failed to point to any evidence in the record establishing the extent of control Randall or Sure Staff exerted over employees. Without such evidence, this court cannot determine whether they were in fact joint employers.[10] Therefore, because Viti has not

[10] Viti's argument that the single employer doctrine applies is frivolous. Viti has pointed to no evidence in the record to established that Randall and Sure Staff "are actually part of a single integrated enterprise . . . ." Western Temp. Servs., 821 F.2d at 1266.

directed this court to any evidence in the record to dispute that Viti worked at Randall less than ninety days and thus had no grievance rights, this fact becomes undisputed.

Because Viti had no right to the formal grievance mechanism, Local 707 could not have breached any duty of fair representation as to Viti. As explained above, Viti must establish both a breach of Local 707's duty of fair representation and Randall's breach of the CBA to succeed on his hybrid § 301 claim. With no breach of Local 707's duty of fair representation, Viti's claim must fail. Consequently, defendants' motion for summary judgment as to Viti is granted. Viti is correct that Randall cannot violate labor laws, including termination for supporting a rival union. However, such an unfair labor practice charge must be brought before the NLRB, which in Viti's case it was and was dismissed. Because Viti had no right under the CBA to have Local 707 grieve this complaint to arbitration, he cannot succeed on his hybrid § 301 claim. See DelCostello, 462 U.S. at 163-65.

3. Plaintiff Willard Berge

Berge's primary claim is that Randall violated the CBA by terminating him instead of Roy Walker ("Walker") and by assigning Walker to drive Berge's truck. Berge claims that Walker had less seniority than him and therefore, pursuant to Article XIII of the CBA, should have been laid off or terminated first. (Randall's 56.1 Stmt. as to Berge, Ex. C at 13.) The bottom line is that the parties dispute who had more seniority at Randall, Berge, Walker, or Gear, and who was in what bargaining unit position. At this summary judgment stage of this litigation, this court cannot decide such factual disputes. Randall is correct that it had the power under the CBA to determine the size of its workforce under the CBA's management right's clause (Randall's 56.1 Stmt. as to Berge, Ex. C at 16, Art. XXIII.); however, Randall was still obligated to reduce its workforce pursuant to the seniority provisions of the CBA. Berge claims Randall did not do so, and Randall claims it did. Such a dispute of material fact precludes summary judgment.

In addition, as with Pease, material facts remain in dispute as to whether Berge was terminated for his support of Local 150. It is undisputed that Berge openly supported Local 150 and Randall knew this. (Randall's 56.1 Resp. ¶ 15.) Based upon the timing of Berge's termination, a decrease in Berge's hours, and the transfer of an allegedly less senior employee, Walker, to a driving position, a factfinder could find that Berge was unlawfully terminated because of his support for Local 150 as opposed to terminated because of a downturn in Randall's business. Therefore, summary judgment as to Berge is denied on this claim.

Summary judgment must also be denied on Berge's remaining claim that his hours were decreased in violation of the CBA. Article VI, Section 1 of the CBA provides merely that Randall will pay its employees for a minimum of thirty-two hours of work each week. (Randall's 56.1 Stmt. as to Berge, Ex. C at 7.) As long as Randall does not decrease Berge's hours for an unlawful reason, nothing in the CBA

prohibits Randall from decreasing his hours, so long as Berge is paid for thirty-hours of work per week. However, material facts are in dispute as to whether Randall reduced Berge's hours because of Berge's support of Local 150, which is prohibited by federal law and the CBA. (Randall's 56.1 Stmt. as to Berge, Ex. C at 13, Art. XV.)[11]

4. Plaintiff Mike Gear

Gear's only claim pending before this court is that he was not paid his contractually-guaranteed thirty-two hours in one week. Gear argues that he has also alleged a claim that Randall failed to pay him the contractually-guaranteed four hours per day. This claim is nowhere to be found in the first amended complaint. Gear failed to put Randall on notice of such claim. In addition, as explained above, a brief in opposition to a motion for summary

[11] Apparently, Berge's claims regarding his weekly minimum hour guarantee and severance fund contributions have been resolved and are now moot. (Pls.' Consol. Mem. in Opp'n at 9 n.6.)

judgment may not amend the complaint. Grayson, 308 F.3d at 817.

Gear asserts that his absence from work was due to a work-related injury. Randall argues that Gear left on his own initiative and did not follow proper procedures in documenting his alleged injury. It seems clear from the parties' papers that a work-related injury would not preclude Gear from receiving the minimum number of hours due under the CBA. Morever, Randall does not point to any evidence in the record which establishes that Gear was contractually required to follow a specific procedure in documenting his time off from work.[12] What is before this

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[12] Randall cites to Charles Truckenbrodt's deposition for the proposition that "Randall typically pays employees who leave work for a work related injury provided they inform the company of their situation prior to leaving work." (Randall's Mem. as to Berge at 7.) Unfortunately, deposition pages 46-47 are not included as part of Randall's exhibits as to Gear. This court cannot look to the deposition to determine if such a "policy" was made known to employees such as Gear. In addition, as Randall does throughout its materials submitted to this court, Randall cites directly to the record in its memorandum. This is improper. Parties are to cite to their 56.1 statements of facts, which in turn cite directly to the record. Malec v. Sanford, 191 F.R.D. 581, 586

court is Gear's word that he left work because of a work-related injury and Randall's word that Gear left on his own initiative and never proved he was injured at work. Again, such a dispute of material fact, even when it appears only a few hours of pay are involved, cannot be decided on summary judgment. Thus, defendants' motion for summary judgment is denied on Gear's claim.

CONCLUSION

For all of the reasons stated above, plaintiffs' motion for summary judgment is granted as to Randall's affirmative defenses two, four, five, and six. Plaintiffs' motion for summary judgment is denied in all other respects. Defendants' motion for summary judgment is denied as to the claims raised by Pease, Berge, and Gear. Defendants'

(N.D. Ill. 2000). Similar to what Judge Castillo pointed out in Malec, Randall not only cites directly to the record but cites to a part of the record not included in its 56.1(a) statement of undisputed facts. Here, Randall's 56.1 statement as to Gear says nothing about a Randall policy requiring employees to inform Randall of work-related injuries prior to leaving work. Consequently, such a "fact" as it may be cannot be taken as undisputed.

motion for summary judgment is granted as to Viti. All claims brought by plaintiff Viti are dismissed. All previously set dates stand. The parties are strongly encouraged to discuss settlement.

ENTER:

s/_____
JAMES F.
HOLDERMAN
United States District
Judge

DATE: November 7, 2003